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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-581

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

ALAN BERCK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner, the People of the State of New York, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered herein on July 2, 1973.

Opinions Below

The opinion of the New York Court of Appeals is reported at 32 N Y 2d 567; 300 N.E. 2d 411; and 346 N.Y.S. 2d ——, and is reproduced as Appendix E. The decision slip of the Appellate Term of the Supreme Court, Ninth and Tenth Judicial Districts is unreported and is reproduced as Appendix C. The opinion of the District Court of Nassau County is unreported and is reproduced as Appendix A.

Jurisdiction

The judgment of the New York Court of Appeals was entered on July 2, 1973.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Question Presented

Is New York Penal Law § 240.35(6) (loitering) unconstitutional?

Statutory Provision Involved

New York Penal Law § 240.35 provides in pertinent part:

> "A person is guilty of loitering when he
>
> * * *
>
> (6) loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes; * * *
>
> Loitering is a violation".
>
> Vol. 39, Part 2, McKinney's Consolidated Laws of New York, p. 166.

Statement of the Case

On September 7, 1970, at about 1:00 A.M., respondent then 17 years of age, was arrested and charged with loitering in violation of New York Penal Law § 240.35(6), [Stenographic minutes of trial, pp. 30, 33]. He had been ob-

served by a uniformed police officer in a marked radio car, [*id.*, p. 9] standing within the property line behind a tree near the entrance to the driveway of a vacant house whose owners were known by the officer to be away on vacation, [*id.*, pp. 7-8; 25; 28-29]. The officer, who had driven to the premises in response to a radio call, [*id.*, pp. 3-5] requested respondent to furnish his name and address and to produce identification. Upon his refusal to do this, he was arrested, [*id.*, pp. 9; 18; 20; 30; 33].

Respondent was brought to trial in the District Court of Nassau County (the local court of petty civil and criminal jurisdiction) on February 18, 1971. His counsel moved to dismiss the information upon the ground that the New York Penal Law § 240.35(6) violated the Fifth and Fourteenth Amendments to the Constitution of the United States; specifically, that it abridged the privileges and immunities of citizens by restricting their free movement; that it compelled self-incrimination; that it was void for vagueness and that it authorized arrests on less than probable cause. The trial judge denied motion to dismiss on constitutional grounds, specifically holding the statute to be "exact enough to be enforced, interpreted and understood" [*id.*, p. 56] and generally holding that the statute did not conflict with the Fifth and Fourteenth Amendments [*id.*, p. 57]. Upon the evidence, respondent was found guilty by the Court sitting without a jury, and was sentenced to a fine of twenty-five dollars or five days' imprisonment. On July 7, 1972, the Appellate Term of the Supreme Court, Ninth and Tenth Judicial Districts affirmed the conviction without opinion (Appendix C). Leave to appeal to the New York Court of Appeals pursuant to New York Criminal Procedure Law § 460.20 was granted by Hon. John F. Scileppi, Associate Judge, on September 19, 1972.

By a margin of four to three, the New York Court of Appeals reversed the judgment below and directed the dismissal of the complaint upon the ground that New York

Penal Law § 240.35(6) was unconstitutional. This holding was based primarily upon this Court's rulings in *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 (1972) and *Palmer* v. *City of Euclid,* 402 U.S. 544 (1971), declaring Florida and Ohio vagrancy-loitering statutes unconstitutionally vague (Appendix E, p. 21). In addition, the majority accepted respondent's claims that the statute permitted arrests to be made upon less than probable cause, contrary to the Fourth and Fourteenth Amendments as condemned by this Court in the *Papachristou* case, *supra,* 405 U.S. at 169; that it also abridged the privileges and immunities of citizens of the United States in restricting their free movement, citing *Edwards* v. *California,* 314 U.S. 160, 178 (1941) and *Twining* v. *New Jersey,* 211 U.S. 78, 97 (1908); and, that it violated the Fifth Amendment right against compulsory self-incrimination by punishing persons who failed to answer a police officer's questions, citing *Davis* v. *Mississippi,* 394 U.S. 721, 727 (1969) (*id.* p. 21).

The dissenters pointed out that New York Penal Law § 240.35(6) was an example of many recent legislative attempts to replace the ancient vagrancy and disorderly person type statutes with modern laws designed to give the police the power "to inhibit the consummation of 'inchoate' crime by footpads, pickpockets, burglars, and the like, on the hunt in pursuit of victims" (*id.* p. 22). They rejected the claim that the statute was vague as well as the principle that an arrest for an "inchoate crime" requires probable cause (*id.* p. 24). Construing the statute narrowly, the dissenters would have permitted an arrest upon

> "circumstances which justify suspicion; * * * be objectively tested, * * *, based either on observation or reliably reported information, which must support a strong inference, less than probable cause for an arrest, but more than speculation or merely subjective distrust that the person is likely to be engaged or about to engage in crime" (*id.* p. 25).

Reasons for Granting the Writ

The instant case presents the issue, not heretofore decided by this Court, whether the State may constitutionally prevent "inchoate crime" by arresting and removing from the scene and, where necessary, searching persons who the objestive circumstances indicate are loitering for the purpose of commiting illegal acts, but have not done anything rising to the level of an attempt to commit a crime.

This Court has held that a properly drawn loitering statute is constitutional. *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 91 (1965). However, in the last few years, it has struck down various State loitering laws for being unconstitutionally vague. *Palmer* v. *City of Euclid*, 402 U.S. 544 (1971). *Coates, et al.* v. *City of Cincinnati*, 402 U.S. 611 (1971), *Papachristou* v. *Jacksonville*, 405 U.S. 156 (1972), and *Smith* v. *Florida*, 405 U.S. 172 (1972). Although the statutes involved in those cases differ significantly in scope and approach from the New York loitering statute, the effect of these decisions is to render uncertain the state of the law in an area which is vital to modern police work.

To date, this Court has only dealt either with statutes which punished mere "hanging around", *Palmer* v. *City of Euclid, supra*, 402 U.S. at 544, as have other lower federal and state courts, see *Anderson* v. *Nemetz*, 474 F. 2d 814 (9th Cir. 1973); *United States* v. *Hall*, 459 F. 2d 831 (D.C. Cir. 1972); *Ricks* v. *District of Columbia*, 414 F. 2d 1097 (D.C. Cir. 1968); *Kirkwood* v. *Loeb*, 323 F. Supp. 611, 616 (W.D. Tenn. 1971); *Scott* v. *District Attorney, Jefferson Parish*, 309 F. Supp. 833 (E.D. La. 1970); *State* v. *Starks*, 186 N.W. 2d 245 (Wisc. 1971); *Baker* v. *Binder*, 274 F. Supp. 658 (W.D. Ky. 1967); or laws similar to the vagrancy statute voided in *Fenster* v. *Leary*, 20 N Y 2d 309, 229 N.E. 2d 426; 282 N.Y.S. 2d 739 (1967). *United States* v. *Kilgen*, 431

F. 2d 627 (5th Cir. 1970); or a combination of the two, *State* v. *Grahovac,* 480 P. 2d 148 (Hawaii, 1970); *Arnold* v. *City and County of Denver,* 464 P. 2d 515 (Colo. 1970).

It is noteworthy that in *State* v. *Starks, supra,* 186 N.W. 2d at 250, the Wisconsin Supreme Court recommended the adoption of the American Law Institute Model Penal Law § 250.6 as a possible substitute of its loitering statute. New York Penal Law § 240.35(6) is actually more narrow and restrictive than the ALI model which was held unconstitutional in *City of Portland* v. *White,* 9 Cr. L. Rep. 2283 (Portland, Ore. Mun. Ct. *en banc,* 1971).

The dissenting opinion in this case sugests that a probable cause requirement is inappropriate for predicating an arrest in a loitering case (Appendix E, at). Whether this comes within the Fourth Amendment's definition of a "reasonable" seizure is a subsidiary question which this Court may wish to consider. We would, however, submit that the statute can be construed so as to conform to this Court's probable caue test set down in *Sibron* v. *New York,* 392 U.S. 42, 61-62 (1968); and this Court's ruling that a trained police officer is permitted to draw reasonable inferences from a person's conduct, as in this case, where it is clear to any reasonable person that petitioner was up to no good, *Terry* v. *Ohio,* 392 U.S. 1, 23 (1968).

The instant case thus presents this Court with an opportunity to define the scope of permissible police power to prevent street crime. We respectfully submit that this issue is of national significance and warrants plenary review by this Court.

CONCLUSION

The petition for certiorari should be granted.

Dated: New York, New York, September 26, 1973.

Respectfully submitted,

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APPENDIX A

Decision of the District Court of Nassau County, per Hon. Benjamin Zipper, District Court Judge, Sustaining Constitutionality of N. Y. Penal Law § 240.35(6)

***People* v. *Alan Berck*, Index Number CR 2935B, Minutes of Trial, February 17, 1971, pages 55-57**

The Court: Counsel for the defendant has presented a rather forceful argument for dismissal, based upon the argument on the part of People v. Beltrand. I can find no decision of the Court of Appeals' ruling specifically on this particular section of the Penal Law.

In the case of People v. Schamberger, 24 N.Y. 2d 288, the Court found it unnecessary to deal with the constitutional argument in that case; didn't pass upon it.

So, at this stage we have no ruling by an appellate court on this particular point as to the specific subdivision involved in this particular case.

In the case of People v. Beltrand there was one citation—People v. Bell, which is 306 N.Y. 110—which upheld the loitering statute. But there it pertains to railroad station, if I recall.

In examining the statute, the Court has taken into consideration the strong presumption that a statute duly enacted by the Legislature is constitutional, and its invalidity must be demonstrated beyond a reasonable doubt.

Based upon what I have read, it is my interpretation that the statute is valid and is constitutional at this particular time until some higher court rules to the contrary.

I find the statute to be exact enough to be enforced, interpreted and understood.

As far as the disjunctive language is regard to engaged or about to be engaged in a crime, that of course has been held to be proper language as cited in the Beltrand case

under the decision of People v. Diaz, 4 N.Y. 2d on p. 471, where it is pointed out in the Beltrand decision, whenever a conviction for loitering has been upheld, it is because the statute uses the term "loiter or loitering" to point up the prohibitive act, either actual or threatened. And that is the situation here. Engaged or about to be engaged in a crime.

I find that the motion of the defendant in regard to constitutionality under the Fourteenth and Fifth Amendments is hereby denied. The exception of counsel is noted for the record.

APPENDIX B

***People* v. *Alan Berck*, District Court of Nassau County, First District, Index Number CR 2935 B**
Judgment of Conviction Entered February 24, 1971

(See opposite ☞)

Index CR29359/70
DC 107 M-926

Record of Conviction Crim. Code, 721 722

DISTRICT COURT OF NASSAU COUNTY

First DISTRICT, Criminal PART

COURT OF SPECIAL SESSIONS

The People of the State of New York,

against

Alan Berok

February 25th 19 71

The above named Alan Berok having been brought before Hon. Benjamin Zipper, Judge, District Court of Nassau County, New York, holding a Court of Special Sessions, charged with vio. sec. 240.35 sub. 6 PL

and, having thereupon pleaded ---- guilty and upon such plea duly convicted. It is adjudged that he pay a fine of $25.00 (twenty-five Dollars, or be imprisoned in the NASSAU COUNTY JAIL *until said fine be paid, not exceeding* five (5) *days.* Fine was paid.

Dated at Mineola, Nassau County, N. Y., this 25th day of February 1971

State of New York,
COUNTY OF NASSAU, } ss.:

I certify that I have compared the above with the original Certificate of Conviction made and signed by me as a Court of Special Sessions, and that the same is a correct copy thereof and transcript therefrom and of the whole thereof.

Dated at Mineola Nassau County, N. Y., this 25th day of February 1971

Judge District Court of Nassau County
Holding a Court of Special Sessions

Officer must deliver copy of the above, with above certificate signed, to keeper of the jail, with the defendant, as the commitment. Crim. Code, § 738

To the Sheriff of said Nassau County:

In the name of the People of the State of New York:

You are commanded to receive the above named ..... into your custody, and retain ..... until said judgment be satisfied or ..... he be legally discharged.

And to any Marshal or Deputy Sheriff of said County of Nassau, Greeting:

The People of the State of New York command you to convey the body of said ..... and deliver ..... into the custody of the Sheriff of Nassau County.

Dated at ....., County of Nassau, this day of , 19....

Judge District Court of Nassau County, N. Y.
Sitting as a Court of Special Sessions

APPENDIX C

***People* v. *Alan Berck*, Appellate Term of the Supreme Court, Ninth and Tenth Judicial Districts, Calendar Number 68-1972 May, 1972 Term**

Decision Slip

Cal. No. 68. *The People of the State of New York*, Respondent v. *Alan Berck*, Appelant (N)

Judgment of conviction affirmed. No opinion. All concur.

Filed July 7, 1973.

APPENDIX D

Judgment of the Appellate Term

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, held in Nassau County on the 7 day of July, 1972.

Cal. No. 68-1972
May 1972 Term

Present: Hon. Howard T. Hogan, *Presiding Justice.*
Hon. Mario Pittoni,
Hon. Frank S. McCullough,
Justices.

The People of the State of New York,

Respondent,

vs.

Alan Berck,

Appellant.

The above named Alan Berck, the defendant herein having appealed to this Court from a judgment of the District Court, County of Nassau, First District, rendered on the 25th day of February 1971, after a trial convicting him of a violation of Section 240.35 (6) Penal Law and imposing sentence as follows:

$25.00 or 5 days.

and the said appeal having been argued by Mr. Robert B. Hemley of counsel for the appellant, and argued by Mr. Herbert H. Esrick of counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgment of conviction so appealed from be, and the same is hereby, affirmed.

HOWARD T. HOGAN,
Presiding Justice, Appellate Term.

APPELLATE TERM—SUPREME COURT
NINTH and TENTH JUDICIAL DISTRICTS
STATE OF NEW YORK

I, FRANK A. CUNNINGHAM, Clerk of the Appellate Term of the Supreme Court, Ninth and Tenth Judicial Districts, do hereby certify that I have compared this copy with original filed in my office on Jul 7 1972 and that this copy is a correct transcript of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on Jul 10 1972.

FRANK A. CUNNINGHAM,
Clerk.

APPENDIX E

Opinion of the Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* ALAN BERCK, Appellant.

32 N Y 2d 567

Argued May 29, 1973; decided July 2, 1973.

BURKE, J. On this appeal brought on constitutional grounds, we are called upon to determine the validity of section 240.35 (subd. 6) of the New York Penal Law.[1] Thus, the court is confronted with constitutional questions which go directly to the core of the matter herein. If the statute is constitutional, the evidence is sufficient to sustain the conviction.

Truly aware of the rule stated in *People* v. *Pagnotta* (25 N Y 2d 333, 337 [1969])—that "There is a strong presumption that a statute duly enacted by the Legislature is constitutional" and "that in order to declare a law unconstitutional, the invalidity of the law must be demonstrated beyond a reasonable doubt. (*Matter of Van Berkel* v. *Power*, 16 N Y 2d 37, 40)", we find that the statute represents another violation of due process of law because it is not clear and positive as to give an unequivocal warning to the citizen of the rule which is to be obeyed.

It is a principle of due process, the Supreme Court declared in *Papachristou* v. *City of Jacksonville* (405 U. S. 156, 162), that a penal law is void for vagueness when it

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[1] "§ 240.35 Loitering.—A person is guilty of loitering when he: * * * 6. Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes".

" 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden * * *' *United States* v. *Harriss*, 347 U. S. 612, 617". Moreover, as this court wrote in *People* v. *Diaz* (4 N Y 2d 469, 470), "It is the rule that for validity a criminal statute must be informative on its face (*People* v. *Firth*, 3 N Y 2d 472) and so explicit that 'all men subject to their penalties may know what acts it is their duty to avoid' (*United States* v. *Brewer*, 139 U. S. 278, 288; *People* v. *Vetri*, 309 N. Y. 401)." (See, particularly, *People* v. *Bambino*, 69 Misc. 2d 387.)

The statute in the case before us is not informative on its face and utterly fails to give adequate notice of the behavior it forbids. The statute contains two substantive elements: (1) loitering "in or about a place without apparent reason", (2) under circumstances which "justify suspicion" that a person "may be engaged or about tc engage in crime".[2] Certainly, in light of our decision in *People* v. *Diaz* (4 N Y 2d 469, 470, *supra*)—in which we held unconstitutionally vague an ordinance penalizing lounging or loitering "about any * * * street corner in * * * Dunkirk"—the first element standing alone could not possibly be held to give sufficient notice of the conduct proscribed. The second element—that the loitering be done under circumstances which justify suspicion that a person is engaged in or about to engage in crime—is similarly obscure. Assuredly, there are no commonly understood set of suspicious circumstances of which all citizens are aware and to which applicability of the statute is restricted. In

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[2] The third conjunctive element of subdivision 6 that "upon inquiry * * * [defendant] refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes" is not actually a substantive element of the violation but rather a "procedural condition" to arrest under the statute. (*People* v. *Schanbarger*, 24 N Y 2d 288, 291-292; *People* v. *Merolla*, 9 N Y 2d 62, 68; *People* v. *Bell*, 306 N. Y. 110, 115.) A discussion of this sort of provision appears hereafter (*infra*, p. 571).

other words, this additional language does not condemn any identifiable act or omission or restrict the operation of the statute to a particular place or a clearly defined set of circumstances but, rather, it merely indicates that a person may be held for loitering if suspicion of criminality happens to be created in the mind of the arresting officer. In short, as we declared in the *Diaz* case (4 N Y 2d, at p. 471), the statute fails not only "to point up the prohibited act, either actual or threatened" but to advise the citizen in sufficiently clear and unambiguous terms of the distinction between "conduct calculated to harm and that which is essentially innocent."

The loitering statutes which we have upheld against attack on the ground of vagueness are altogether different from the sort of provision here challenged. (See, e.g., *People* v. *Pagnotta*, 25 N Y 2d 333, *supra; People* v. *Merolla*, 9 N Y 2d 62; *People* v. *Johnson*, 6 N Y 2d 549; *People* v. *Bell*, 306 N. Y. 110.) In each of the cited decisions, the statutes before the court were sustained either because they clearly "point[ed] up" the prohibited act (e.g., *People* v. *Diaz*, 4 N Y 2d 469, 471, *supra; People* v. *Pagnotta*, 25 N Y 2d 333, *supra*) or else restricted loitering only at specific facilities where the likelihood of illegal activity was notorious (e.g., *People* v. *Merolla*, 9 N Y 2d 62, *supra; People* v. *Johnson*, 6 N Y 2d 549, *supra; People* v. *Bell*, 306 N. Y. 110, *supra*). For instance, in *Pagnotta* (25 N Y 2d 333, 338, *supra*), we sustained a provision of the former Penal Law making it illegal to loiter about any "stairway, staircase, hall, roof, elevator, cellar, courtyard or any passageway of a building for the purpose of unlawfully using or possessing any narcotic drug". And, in the *Merolla* case (9 N Y 2d 62, 66, *supra*), we held valid a provision of the Waterfront Commission Act which forbade loitering "upon any vessel, dock, wharf, pier, bulkhead, terminal, warehouse, or other waterfront facility". The statute involved in *Merolla* (9 N Y 2d, at pp. 66-68), we observed in that case, dealt with loitering at "specific

facilities'' which were notorious for ''the evils which * * * pervaded the area''. Quite obviously, such specificity of the prohibited conduct is totally lacking in the statute before us.

Not only is subdivision 6 of section 240.35 of the Penal Law unconstitutionally vague for the reason that it fails to give adequate notice of the conduct to be avoided and punished but also because it places virtually unfettered discretion in the hands of the police and thereby encourages arbitrary and discriminatory enforcement. (See, e.g., *Papachristou* v. *City of Jacksonville,* 405 U. S. 156, 168-171, *supra;* see, also, Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205, 220-224.) More specifically, the provision in question, containing as it does absolutely no guidelines governing the determination as to whether a person is engaged in suspicious loitering, leaves such determination solely up to the discretion of the police officer. Similarly, enforcement of the law depends entirely upon whether the arresting officer is satisfied that a suspect has given—as required by the statute to avoid arrest—a ''reasonably credible account of his conduct and purposes''. As has been said with respect to such ''satisfactory account'' requirements in vagrancy statutes, ''It takes little imagination to perceive that the 'reasonable account' (or 'good account' or 'satisfactory account') requirement of the ordinary vagrancy law operates simply as a charter of dictatorial power to the policeman.'' (Amsterdam, *op. cit.,* p. 223.) Thus, whether or not a suspect is hauled off to jail for suspicious loitering depends, for all intents and purposes, upon the whim of the policeman. (See, e.g., *Seattle* v. *Drew,* 70 Wn. 2d 405, 411.) In short, the absence of any ascertainable standards governing arrest and conviction under the statute renders fair, even-handed administration of the law a

virtual impossibility. This statement from *Papachristou* v. *City of Jacksonville* (405 U.S. 156, *supra*)—in which the court invalidated a vagrancy ordinance penalizing, among other things, "wandering or strolling around from place to place without any lawful purpose" (405 U. S., at p. 157, n. 1)—is most apt (405 U. S., at p. 170): "Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.' *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98."[3]

Still another aspect of vagueness fatally afflicts subdivision 6. By authorizing an arrest for loitering "under circumstances which justify suspiciou that [a person] may be engaged or about to engage in crime," subdivision 6 of section 240.35 plainly undercuts the constitutional requirement that arrests are lawful only upon a showing of "probable cause." As the Supreme Court pointed out in the *Papachristou* case (405 U. S., at p. 169),

"We allow our police to make arrests only on 'probable cause,' a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government. Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality.

* * *

"A direction by a legislature to the police to arrest all 'suspicious' persons would not pass contitutional muster. A vagrancy prosecution may be merely the cloak for a

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[3] It is, of course, no answer to assert that the police will, in fact, attempt to administer the law in good faith and try not to abuse the virtually unrestricted discretion it confers. As the Supreme Court stated sometime ago, "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." (*Baggett* v. *Bullitt*, 377 U. S. 360, 373.)

conviction which could not be obtained on the real but undisclosed grounds for the arrest."

Manifestly, this constitutional infirmity of general vagrancy ordinances—that they may be used by the police to obtain custody of a person whom they suspect of more serious offenses but whom they cannot lawfully arrest for such crimes because there is no probable cause to support such an arrest—is equally inherent in the general loitering provision in the present case.

As bearing on this, it is interesting and relevant that the American Law Institute discarded a loitering provision (Model Penal Code § 250.12 [Tent. Draft. No. 13, 1961])[4] very like subdivision 6 and substituted a far more specific and tightly drawn provision (Model Penal Code § 250.6 [Proposed Official Draft, 1962]),[5] in order "to save the

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[4] Thus, section 250.12 of the Model Penal Code's Tent. Draft No. 13 provides: "A person who loiters or wanders without apparent reason or business in a place or manner not usual for law-abiding individuals and under circumstances which justify suspicion that he may be engaged or about to engage in crime commits a violation if he refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfulness of his conduct and purposes."

[5] The revised loitering provision reads as follows (Model Penal Code, § 250.6 [Proposed Official Draft, 1962]): "A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstances makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm."

section from attack and possible invalidation as a subterfuge by which the police would be empowered to arrest and search without probable cause" (Comment, p. 227, to Model Penal Code, § 250.6 [Proposed Official Draft, 1962]).

In this case, the defendant may very well have been conscious of the importance of protecting the identity of a young lady who was "the other party" on a "sparking expedition". Manifestly, prohibiting such harmless conduct serves no reasonable State interest consistent with the Fourth or Fifth Amendment. It violates the "privileges and immunities" clause of the Fourteenth Amendment by restricting the free movement of citizens of the United States through the State of New York (*Edwards* v. *California*, 314 U. S. 160, 178 [1941]; *Twining* v. *New Jersey*, 211 U. S. 78, 97 [1908]). It violates the Fifth Amendment because it punishes a person who fails to identify himself and his probable companion or give an account of his or their conduct and purposes. The "reasonably credible account" element requires those of whom it is demanded to choose between a possible loitering prosecution predicate on their silence and possible self incrimination predicated on what statement they make. An *arrest* is not concerned with a *stop* which is an entirely different thing (*Sibron* v. *New York*, 392 U. S. 40; *People* v. *Rivera*, 14 N Y 2d 441, cert. den. 379 U. S. 978 [1965]). While an officer may have a right to inquire into suspicious circumstances, a suspect's silence may not be used as a predicate for a separate offense such as loitering—"While the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer" (*Davis* v. *Mississippi*, 394 U. S. 721, 727, n. 6).

The overriding consideration is that subdivision 6 of section 240.35 is unconstitutionally vague on its face (see, e.g., *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, *supra; Palmer* v. *Euclid*, 402 U. S. 544; *People* v. *Diaz*, 4 N Y 2d 469; *supra; Seattle* v. *Drew*, 70 Wn. 2d 405, *supra*).

Accordingly, the judgment of conviction should be reversed and the complaint dismissed as section 240.35 (subd. 6) of the New York Penal Law is unconstitutional.

BREITEL, J. (dissenting). I would affirm.

Defendant was convicted of a violation of section 240.35 (subd. 6) of the Penal Law, which, in pertinent part, provides:

"A person is guilty of loitering when he:

* * *

"6. Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give reasonably credible account of his conduct and purposes".

The statute is one of many modern efforts to replace the utterly vague and status-type offenses that have been struck down as unconstitutional, despite their antiquity, which have borne the rubric of vagrancy or disorderly person offenses (e.g., *Fenster* v. *Leary*, 20 N Y 2d 309; *Papachristou* v. *City of Jacksonville*, 405 U. S. 156; *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87; see, Ann., Vagrancy Statutes—Validity, 25 ALR 3d 792; Ann., Loitering Statutes—Validity, 25 ALR 3d 836; Ann., Disorderly Conduct—Vagueness, 12 ALR 3d 1448). These modern efforts have been generally accepted as desirable in order to give law enforcement officers powers to inhibit the consummation of "inchoate" crimes by footpads, pickpockets, burglars, and the like, on the hunt in pursuit of victims.

In this case, the police had been advised that certain residential premises would be temporarily unoccupied. On patrol, they observed defendant standing behind a tree, at 1:00 A.M., seeming to be examining the unoccupied

premises. When questioned by the police, he refused to explain his presence, but more important, or even to identify himself. No other person was present and there was, of course, no indication of a tryst.

The statute, it is suggested, is not so vague as to preclude the denotation of conduct giving justifiable belief that a crime is being or is about to be committed. It requires the following elements in conjunction:

1. Loitering without apparent reason.

2. Additional circumstances giving rise to suspicion of present or intended criminal activity.

3. Refusal to respond to inquiry by a peace officer by identifying one's self and explaining the questioned conduct.

The arrest and conviction are not for any one of these grounds but were and must have been for all three. Moreover, to satisfy the important second requirement referring to "circumstances" there must be objective facts justifying suspicion. The measure would be the factual circumstances and not the police officer's idiosyncratic capacity for suspicion. The quality of the factual circumstances and the strength of the inference that the defendant "may be engaged or about to engage in crime" would be for the courts to assess.

Dissenting opinion per BREITEL, J.

The elements are amply supplied in this case: the sparsely populated residential area involved; the temporarily unoccupied residence; the defendant standing behind a tree in front of the residence; the unusual hour of 1:00 A.M.; and the absence of any other persons until the patrol car came along. Those circumstances bespeak "casing" the house for a possible burglary; but, as with any inchoate offense, there was no action sufficient to establish even a criminal

attempt. These circumstances did not make unreasonably intrusive the police inquiry, and when that inquiry was denied, even as to defendant's identity, simple reason suggests removing the defendant from the scene. As the prosecutor argued on the appeal, what else were the police to do at that hour, unless they were to drive away and let happen what might happen.

The majority in striking down the statute does not suggest that statutes defining inchoate offenses are necessarily invalid; they simply find this one wanting without suggesting what kind of statute would satisfy the public need (compare *Seattle* v. *Drew*, 70 Wn. 2d 405, where the court struck down a vague Washington statute and suggested section 250.6 of the A. L. I. Model Penal Code as a guide to drafting a new statute). That, of course, is the majority's privilege, as it always is of any court. However, in the light of the serious effort by draftsmen for many years, including those of the American Law Institute, to evolve satisfactory language, one would hope that future draftsmen could be given more constructive encouragement.

True, the majority points to the draft of a similar provision in the A. L. I. Model Penal Code (§ 250.6) which, to be sure, has added words, but none that are not embraced in the language of the instant statute. "Suspicion of crime" obviously relates to "alarm for the safety of persons or property". The Model Code in using as illustrations "Among the circumstances which may be considered", defined factors in the disjunctive, two of which were present here, namely, refusal to identify one's self and manifestly endeavoring to conceal one's self (behind a tree). I would prefer the more detailed language of the Model Penal Code but I have difficulty in seeing that the detail goes beyond the encompassing language of the instant statute.

The majority resists the criterion of "suspicion" in the instant statute. But the resistance, it is suggested, is misplaced. The draftsmen wisely avoided the phrase "prob-

able cause" associated with basis for arrest for attempt or completed crime, and, therefore, inappropriate for defining an inchoate offense. Mere suspicion in inadequate for any police action because it relates to the officer's state of mind only. The phrase in the instant statute is "circumstances which justify suspicion". This is more than police suspicion and less than probable cause to arrest for crime, the very middle ground to be reached. In this very troublesome and often frustrating field for legislative draftsmen, the majority gives no guidance whether such a middle ground is constitutionally permissible; that is, whether it is sufficient to justify the limited police intrusiveness authorized by the statute, and if so, how to express it in sufficiently definite terms. Nor is any guidance given whether the failure to respond to police inquiry, a critical element in the control of inchoate crimes, is a constitutionally permissible device.

For all these reasons, I would construe the statute narrowly and thus sustain its validity. Circumstances which justify suspicion must be objectively tested, as the statute contemplates, based either on observation or reliably reported information, which must support a strong inference, less than probable cause for an arrest, but more than speculation or merely subjective distrust that the person is likely to be engaged or about to engage in crime.

Accordingly, I dissent and vote to affirm the conviction.

Chief Judge FULD and Judges JONES and WACHTLER concur with Judge BURKE; Judge BREITEL dissents and votes to affirm in a separate opinion in which Judges JASEN and GABRIELLI concur.

Order reversed and the complaint dismissed.

APPENDIX F

Judgment of the Court of Appeals of the State of New York

(remittitur)

(See opposite ☞)

No. 588

Form 8

Court of Appeals

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of December in the year of our Lord one thousand nine hundred and Seventy-two, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding*.

~~RAYMOND J. CANNON~~, *Clerk*.

App. T. 2. No. 589. 72

The People &c.,

Respondent,

vs.

Alan Berck,

Appellant.

Be it Remembered, That on the 19th day of December in the year of our Lord one thousand nine hundred and seventy-two, Alan Berck,

the appellant - in this cause, came here unto the Court of Appeals, by Robert B. Hemley and P. G. Chevigny, his attorney -, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate ~~Division~~ Term of the Supreme Court in and for the Second Judicial Department. And the People &c.,

the respondent - in said cause, afterwards appeared in said Court of Appeals by William Cahn, District Attorney. ~~attorney~~.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by

Mr. Paul G. Chevigny,

of counsel for the appellant -, and by

Mr. Henry P. DeVine,

of counsel for the respondent -,

and after due deliberation had thereon, did order and adjudge that the order

of the Appellate ~~Division~~ Term of the Supreme Court appealed from herein be and the same hereby is reversed and the complaint dismissed. Opinion by Burke, J. All concur except Breitel, J., who dissents and votes to affirm in an opinion in which Jasen and Gabrielli, JJ., concur.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the District Court, Nassau County,

there to be proceeded upon according to law.

Therefore, it is considered that the said order be and the same hereby is reversed as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the District Court, Nassau County,

before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said District Court,

before the Judges thereof, &c.

James M. Hanna

Acting *Clerk of the Court of Appeals of the State of New York.*

Court of Appeals, Clerk's Office,

Albany, July 2 1973.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

James M. Hanna

Acting

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 30 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-581

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

ALAN BRECK,

Respondent.

BRIEF IN OPPOSITION

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IN THE

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No. 73-581

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

ALAN BRECK,

Respondent.

BRIEF IN OPPOSITION

Statement of the Case

Respondent, a boy of 17 years of age who had never before been arrested, was arrested at 1:00 A.M. on September 7, 1970 (Tr. 30)* for loitering in Kings Point, a suburb on Long Island, in violation of New York Penal Law §240.35(6).

A uniformed patrolman of the Kings Point Police Department responding to a call on his police car radio, discovered respondent standing near the driveway entrance to 188 West Shore Drive (Tr. 3-5, 33). He observed the respondent for 35 to 40 seconds. It is not clear from the trial testimony whether respondent was actually standing within the boundaries of 188 West Shore Drive or on the public property which it adjoins (Tr. 25-30), but no

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* The symbol Tr. refers to the trial transcript.

charges of trespassing were entered. The patrolman approached respondent and asked for identification, his name and address, where he was coming from and where he was going (Tr. 8, 18, 20, 34). When respondent did not provide the requested information, the patrolman placed respondent under arrest (Tr. 19, 21), and then returned to his patrol car and ask that a second patrolman be sent to assist him (Tr. 18, 19, 34). Upon arrival, the second patrolman repeated the request for information that had been made by the first patrolman (Tr. 21, 35). When respondent again declined to identify himself or explain what he was doing, he was taken to the precinct house and booked for loitering, and for no other crime (Tr. 21, 22, 30).

While the Petition gratuitously states (p. 5) that " . . . it is clear to any reasonable person that petitioner was up to no good . . . ", there is not a shred of evidence in that connection. As the majority in the Court of Appeals pointed out, it is just as reasonable to assume that the respondent was " . . . protecting the identity of a young lady who was 'the other party' on a 'sparking expedition' " (Petition p. 21).

The procedural history of the case is adequately set forth at pages 3 and 4 of the Petition.

ARGUMENT

The Decision of the New York Court of Appeals Is Correct and Is Based on Rules of Law Recently Reaffirmed by This Court.

The main question presented in this case is whether a state may authorize an arrest and conviction for a criminal offense upon mere suspicion.

The statute at issue, upon its face and as authoritatively interpreted, authorizes an arrest when a person "loiters . . . without apparent reason and *under circumstances which justify suspicion* that he may be engaged or about to engage in crime." (Emphasis added.) This Court has decided upon a number of occasions that suspicion arrests are not justified, most recently in *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 (1972):

> "We allow our police to make arrests only on 'probable cause,' a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government. Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality.
>
> • • • • •
>
> "A direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster. A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest." 405 U.S. at 169.

The New York Court of Appeals recognized and cited this doctrine (Petition p. 19). The issue has been settled by this Court, and the facts and the statute herein present no new issues different from those in *Papachristou.*

Despite the statutory language quoted above, petitioner represents that the question presented is whether the state may "prevent 'inchoate crime' by arresting . . . persons who the objective circumstances indicate are loitering for the purpose of committing illegal acts . . . " (p. 5). The State of New York thus follows the lead of the dissenters in the New York Court of Appeals, in seeking to avoid the probable cause requirement for arrest, under the pretense that New York Penal Law §240.35(6) sets forth an "inchoate crime" (Petition p. 25) for which such a high standard of justification for arrest is "inappropriate". It is apparently not suggested that anything less than probable cause is required to effect an arrest for such typical "inchoate crimes" as conspiracy or attempt. The lack of need for probable cause is apparently alleged to be peculiar to a loitering offense, and the reason is not far to seek.

Loitering alone does not define an offense, as the majority of the New York Court of Appeals pointed out (Petition p. 16) and as the State seems to concede. The statutory issue is not whether there is "probable cause" to arrest for loitering *alone,* but whether there is reason to arrest for loitering sufficient to give rise to "suspicion." By definition, this does not rise to the level of probable cause. But it does not follow that there is any reason for this Court to abandon the probable cause requirement. Quite the contrary. When a statute is rooted in a concept as vague as "loitering", the addition of mere "suspicion", so far from eliminating the need for probable cause,

necessarily renders the statute too vague to give fair warning of what is forbidden and vests too much discretion in the police, as Judge Burke clearly explained for the majority in the Court of Appeals (Petition pp. 17-18).

The petitioner represents (Petition p. 5) that this issue has not been decided by this Court, yet the petition goes on to say in part that "to date, this Court has only dealt . . . with statutes which punished mere 'hanging around'". That is exactly what the statute at issue here has done. It penalizes one who "loiters, remains, or wanders . . . " The statute held vague in *Papachristou* v. *City of Jacksonville, supra* at 164, penalized "wandering or strolling" and that in *Palmer* v. *City of Euclid,* 402 U.S. 544 (1971), penalized "wandering or being abroad".* The addition of "suspicion" in the New York Statute does not make the enactment more precise; it is still impossible for a citizen to conform his conduct to it. He cannot tell when his "remaining" may give rise to "suspicion", and thus there is no fair warning of what is forbidden.

Petitioner relies on the "stop-and-frisk" cases, *Sibron* v. *New York,* 392 U.S. 42 (1968); *Terry* v. *Ohio,* 392 U.S. 1 (1968), to try to justify its position. While those cases authorized a stop and a limited "pat-down" for purposes of investigation, there is no suggestion that they authorize an arrest and a conviction upon such suspicion. As this Court said in *Terry, supra*:

> An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise

* The statement that *Shuttlesworth* v. *Birmingham,* 382 U.S. 87 (1965), upheld a loitering statute is simply inaccurate, since the ordinance there was of the "failure to move on" type.

> quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime. 392 U.S. at 26-27.

The decision of this Court in *Terry* with respect to full-fledged arrest for crime, could not have been otherwise, for to authorize an arrest and conviction upon "suspicion" would destroy the law of arrest, see *Beck* v. *Ohio*, 379 U.S. 89 (1964), as well as the standards of definiteness required for a valid criminal statute, *Papachristou* v. *Jacksonville*, *supra*.

This Court has indeed resolved the issue presented by the Petition. The Court has said that "suspicion" may justify investigation, and even a short detention to complete that investigation. Suspicion does not and cannot be the basis for a charge of a criminal nature.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not be granted in this case.

Respectfully submitted,

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October 1973